In the case of *Lee Lian & Ors. v. Public Prosecutor*[1], which was not reported until after the trial of the present case, I myself sitting alone in the Court of a Judge held that by reason of section 113 of the Criminal Procedure Code statements made to Police Officers at a Police Identification parade held in the course of a Police investigation, which must be taken to include actions such as the pointing out of persons in response to questions, were not admissible in evidence at the subsequent trial. What I said was:—

"To my mind, it is not an unfair summary of the position in India to say that although there is controversy as to the admissibility of the fact of identification at a police identification parade there is considerable unanimity to the effect that statements made in the course of such a parade are inadmissible by reason of section 162 of the Indian Criminal Procedure Code and that in this connection statements must be construed as including actions such as pointing out a person in response to questions. In the present case I do not think it is necessary for me to express my opinion as to the admissibility of the fact of identification for the evidence in question here is clearly evidence of statements and on this I would not merely follow but would express my agreement with the Indian decisions which have been quoted to the effect that such statements are inadmissible."

I made it clear in that case that I was prepared to give the necessary certificate for the point to be taken further but the Public Prosecutor did not take any steps to have my decision considered by this Court and indeed in the present appeal counsel for the Public Prosecutor has made no attempt to question my decision but has confined himself to asking for some guidance as to where the line is to be drawn between the bare fact of identification which may be admissible and statements evidence of which is certainly not admissible.

For myself I see no reason to depart from anything I said in *Lee Lian's* case and my brothers Buhagiar and Abdul Hamid agree with what I said there. On the other hand we regret that in the present case we are unable to take what was said in *Lee Lian's* case any further. To do so would be to commit the forensic sin of expressing an opinion as to hypothetical circumstances for in the present case the various identifications of the appellants were made in such circumstances as to be tantamount to statements.

But while we are of the opinion that the evidence in question in the present case was wrongly admitted we are satisfied that the case is one which falls within the proviso to section 29(1) of the Courts Ordinance.

It was never questioned that the robbery was committed and there was an overwhelming body of evidence to show that the four appellants and their fellow accused were the participants in it. Rightly considered the evidence which we have held to be inadmissible went to weaken rather than strengthen the Prosecution case. But making every possible allowance for that we fail to see how any Judge could have refrained from convicting all the accused.

The appeals against conviction are accordingly dismissed in each case.

As regards the sentences imposed, the offence was a serious one and in our opinion if the sentences erred at all it was in the direction of leniency.

Appeals dismissed.

KOH CHEE CHONG v. CHOP FOOK ON

[A. C. J. (Whyatt C.J.) May 4, 1956]

[Singapore — District Court Appeal No. 26 of 1955]

Landlord and Tenant — Recovery of possession — Illegality of rent — Not specifically pleaded — Whether Court bound to take notice of unpleaded facts — Circumstances in which Court will act on its own initiative — Control of Rent Ordinance, 1953 (now Cap. 242).

The appellant was the defendant in an action for recovery of possession of certain premises. The District Judge had found on the facts that rent was payable monthly and had not been tendered. The appellant did not challenge these findings at the hearing of the appeal, but he argued that the Court had no jurisdiction to make an order for possession as the plaintiff had not proved that $50 per month was a lawful rent, there being no evidence on the record to show that its increase to $50 from $31.50 per month which he paid when he first became a tenant had been approved by the Rent Conciliation Board or that $50 per month was not in excess of standard rent.

Held: (1) if the defendant had wished to rely upon any facts as showing illegality he should have pleaded them;

(2) in this case there never was any issue *inter partes* as to whether the rent of $50 p.m. was a lawful rent and consequently the defendants' contention on this point failed;

(3) where a contract is *ex facie* legal but the unpleaded facts indicated that it might be tainted with illegality, the Court would adopt a more cautious attitude before acting on its own initiative. In a case of this kind the Court would not act upon the unpleaded facts unless it was satisfied that the whole of the relevant circumstances were before it. If the defence of illegality had been raised on the pleadings, the Court would be entitled to assume that all the relevant facts were before it but it was otherwise if it was not so pleaded;

(4) in this case, so far from being certain that all the requisite material was before it, it was clear to the Court that the essential evidence was missing, and therefore the appeal failed.

Cases referred to:—

(1) *Edler v. Auerback* (1949) 2 All E.R. 692, 697.

(2) *North Western Salt Co. v. Electrolytic Alkali Co., Ltd.* (1914) A.C. 469, 476.

DISTRICT COURT APPEAL.

R. K. Booker for the appellant.

H. E. Cashin for the respondents.

Whyatt C.J. : — This is an appeal from a decision of the learned District Judge ordering the defendant to deliver up possession of certain premises known as 544 Geylang Road to which the Control of Rent Ordinance, 1953 applies. In the proceedings before the District Judge the defendant, by his pleading, admitted that he held the tenancy of the premises from the plaintiffs at a rent of $50 per month but alleged that the rent was payable in arrear half-yearly and not monthly in advance as alleged by the plaintiffs, and therefore he had not at any material time been in arrears with his rent; he also claimed at the hearing that he had made a tender of the rent which the plaintiffs had refused.

The District Judge had, therefore, to decide two issues of fact, namely, whether the rent was payable monthly in advance or half-yearly, and whether there had been a tender. He decided both issues in favour of the plaintiffs and the defendant did not seek to challenge these findings of fact at the hearing of this appeal. The contention raised by counsel for the defendant on the appeal was of a somewhat unusual character. He referred to certain evidence given on behalf of the plaintiffs in the proceedings before the District Judge to the effect that when the defendant became tenant in March 1954, the rent was increased from $31.50 to $50 per month and pointed out that there was no evidence on the record to show that this increase had been either approved by the Rent Conciliation Board or was not in excess of the standard rent. It followed, therefore, according to the defendant's contention, that the plaintiffs had not proved that $50 per month was a lawful rent and, as a corollary to this proposition, that the arrears of rent were lawfully due, and consequently the Court had no jurisdiction to make an order for possession in this case.

The fallacy in this argument is that it assumes there was an onus on the plaintiffs to prove that $50 per month was a lawful rent. In point of fact this was not so as this had been admitted, if not in terms at least by necessary implication, by the defendant in paragraph 1 of the Defence which stated "the defendant admits that he holds of the plaintiffs the tenancy of 544 Geylang Road, Singapore at a monthly rent of $50 but denies that the rent is payable in advance". If the defendant had wished to rely upon any facts as showing illegality he should have pleaded them. Counsel for the plaintiffs informed the Court that at the close of the plaintiffs' case counsel who was then appearing for the defendant asked that one of the plaintiffs' witnesses should be recalled to enable him to cross-examine him further on the question whether the increase in rent had been approved by the Rent Conciliation Board or was in excess of the standard rent. Counsel for the plaintiffs objected to this course, pointing out that no issue as to the legality of the rent of $50 per month had been raised in the pleadings. The District Judge, thereupon, offered to allow the defendant to amend his pleadings in order to raise this issue but counsel for the defendant elected to continue with the action on the pleadings as they stood. It is clear therefore, there never was any issue *inter partes* in these proceedings as to whether the rent of $50 per month was a lawful rent and consequently the defendant's contention on this point fails.

There remains, however, the important question whether the Court is bound to take notice of unpleaded facts which, having got in evidence because they were not objected to or for some other reason, tend to show that the agreement for payment of rent at the rate of $50 per month was illegal. It is well-settled law that where a contract is *ex facie* illegal, the Court will decline to enforce it, irrespective of whether illegality is pleaded or not. But where, as here, the contract is *ex facie* legal but the unpleaded facts indicate that the contract may be tainted with illegality, the Court will adopt a more cautious attitude before acting on its own initiative. In a case of this kind, as Mr. Justice Devlin pointed out in *Edler v. Auerback*[1], the Court will not act upon the unpleaded facts unless it is satisfied that the whole of the relevant circumstances are before it. If the defence of illegality has been raised on the pleadings, the Court will be entitled to assume that all the relevant facts are before it but it is otherwise if it is not so pleaded. In the words of Lord Moulton in *North Western Salt Co. v. Electrolytic Alkali Co., Ltd.*[2] "the plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence . . . The facts before the Court at the end of the case are, therefore, only a casual selection from the surrounding circumstances, . . . It may be shortly put as follows: if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting"

Applying the law as so laid down to the present case, I have to consider whether I have before me all the relevant material relating to the increase of the

monthly rent from $31.50 to $50. Counsel for the plaintiffs very fairly conceded that it was a reasonable and proper inference for the Court to draw from the evidence given by the plaintiffs' witnesses that the Board had not made an order authorising the increased rent but he strenuously maintained that there was no evidence before the Court that the rent of $50 per month was in excess of the standard rent for these premises. He stated, and counsel for the defendant, as I understood him, did not dissent, that cases do occur, admittedly rarely, where the standard rent is higher than the current rent due to some abnormal arrangement made during the Japanese occupation, and, therefore the Court should not presume that every increase in rent was necessarily an increase in excess of the standard rent. There is considerable force in this contention, assuming, as to which I am doubtful, that I can have regard to general statements of this kind relating to standard rents in exceptional cases, but it seems to me it is not necessary for the plaintiffs to rely upon this particular argument. The proposition which the plaintiffs have to establish is that the Court has got all the material evidence before it and it appears to me that the most convincing argument in support of this proposition is that, after the close of the plaintiffs' case, defendant's counsel asked for it to be re-opened to enable him to adduce further evidence, by means of cross-examination of the plaintiffs' witnesses, in order to establish the alleged illegality. It is clear that he did not think that all the material evidence on this point was before the Court and I also am of that opinion. As Lord Parker said in *North Western Salt Co. v. Electrolytic Alkali Co., Ltd.*[2] (*ibid.* p. 478), the Court ought not, on its own initiative, to refuse to enforce a contract on the ground of illegality unless it is quite certain that all the relevant facts are in evidence. In the present case, so far from being certain that all the requisite material is before the Court, I am quite clear that essential evidence is missing. The defendant might have ensured that it was available if he had amended his defence and called evidence as to the circumstances in which the increase was made, in particular, if he had exercised his right under section 6 of the Ordinance and required the plaintiffs to furnish him with a statement of the standard rent and had produced that statement in evidence. Whether such further evidence if it had been given would have established the alleged illegality is a matter on which I need not speculate. It is sufficient to say that it is the defendant's fault that this material is missing and he must take the consequences. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Rodyk & Davidson.*

LIM KHENG KOOI & ANOR. v. REG.

[A. Cr. J. (Shepherd J.) June 29, 1957]

[Penang — Criminal Appeal No. 16 of 1957]

Prevention of Corruption Ordinance, 1950 — Persons charged with corruption and abetment of corruption — Joint trial — Prima facie case — Mens rea — Meaning of corruptly — Criminal Procedure Code (Cap. 21), s. 182(d) and (f).

This was an appeal against the conviction of the first appellant on three charges of corruption and of the second appellant on charges of abetment of that corruption. The appellants were tried together. The principal ground of appeal urged on behalf of the appellants was that the learned President of the Sessions Court was wrong in calling on the appellants to enter on their defence as no *prima facie* case had been shown against them at the end of the prosecution case. It was also urged on behalf of the second appellant that the learned President was wrong in not granting the application of the appellants for a separate trial.

Held: (1) as the learned President found that there was a *prima facie* case against the first and second appellants, he was not wrong in calling upon them to enter on their defences;

(2) the learned President had a discretion whether to order a separate trial or not and in the circumstances of the case the exercise of the discretion in refusing separate trials did not result in any miscarriage of justice.

Cases referred to:—

(1) *Soo Sing & Ors. v. Public Prosecutor* (1951) M.L.J. 143.

(2) *R. v. Power* (1919) 1 K.B. 572.

(3) *R. v. Abbott* (1955) 2 Q.B. 497.

(4) *Saminathan & Ors. v. Public Prosecutor* (1955) M.L.J. 121.

(5) *Public Prosecutor v. Lee Pak* (1937) M.L.J. 265, 267.